

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,	)	NO. CR-08-2023-LRS
Plaintiff,	)	
	)	<b>MEMORANDUM OPINION</b>
v.	)	
LENNON RAY HESSDORFER,	)	
Defendant.	)	

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A sentencing hearing was conducted in this matter on October 16, 2008. Donald E. Kresse, Esq., appeared on behalf of the Government. Ben Hernandez, Esq., appeared on behalf of the Defendant.

During the hearing, counsel agreed that the court could consider an Affidavit of Probable Cause which had been filed in Snohomish County Superior Court, Case Number 97-1-02924, in connection with Defendant's conviction pursuant to RCW 10.99.040 for violating a domestic no contact order by intentionally assaulting another person. An uncertified copy of the Affidavit of Probable Cause is appended as an exhibit to this memorandum opinion and has been made part of the record in the captioned matter. Although counsel for Defendant consented to the court's consideration of the Affidavit, he maintained his objection that the record, including the Affidavit (which had not been presented by the United States), did not support a finding that the aforementioned Snohomish County conviction was for a "crime of violence" as defined in U.S.S.G. §4B1.2(a).

1 For the reasons it provided during the sentencing hearing, and employing a  
 2 modified categorical analysis, the court finds that the record, including the  
 3 Affidavit of Probable Cause, supports the conclusion that Defendant's conviction  
 4 was for a "crime of violence."

5 Pursuant to a modified categorical approach, the court may examine  
 6 statements of the factual basis of the charge, including a charging document, a  
 7 transcript of the plea colloquy, a written plea agreement presented to the court, "or  
 8 a record of comparable findings of fact adopted by the defendant upon entering the  
 9 plea." *Shepard v. United States*, 544 U.S. 13, 20-21, 125 S.Ct. 1254 (2005). at  
 10 20-21. See also *Fernandez-Ruiz v. Gonzalez*, 466 F.3d 1121, 1132 (9<sup>th</sup> Cir. 2006)  
 11 (under this approach, the court considers whether any of a limited set of specific  
 12 documents, including "the state charging document, a signed plea agreement, jury  
 13 instructions, guilty pleas, transcripts of a plea proceeding and the judgment," show  
 14 the petitioner's conviction entailed an admission to, or proof of, the necessary  
 15 elements of a crime of violence). "[D]ocuments used to satisfy a modified-  
 16 categorical analysis must meet a 'rigorous standard.'" *United States v. Navidad-*  
 17 *Marcos*, 367 F.3d 903, 908 (9<sup>th</sup> Cir. 2004). "[M]ight simply cannot be enough."  
 18 *Id.* The government must demonstrate that the record "unequivocally establishes  
 19 that the defendant was convicted of" a "crime of violence." *Id.*

20 In his "Statement Of Defendant On Plea Of Guilty" filed in Snohomish  
 21 County Superior Court, the Defendant indicated as follows: "On or about  
 22 December 9, 1997 in Snohomish County, WA I did push Sheri Keith, which is an  
 23 assault, in violation of a no contact order that I knew existed and was valid." (Ex.  
 24 B to Ct. Rec. 30 at p. 11). This alone does not "unequivocally" establish that the  
 25 Defendant was convicted of" a "crime of violence" because the "push" referred to  
 26 could just as well have amounted to no more than an unlawful "offensive"  
 27 touching which did not involve use of substantial physical force, nor serious  
 28 potential risk of physical injury. See *United States v. Sandoval*, 390 F.3d 1077,

1 1081 (9<sup>th</sup> Cir. 2004) (under the categorical approach, Third Degree Assault does  
2 not qualify as a “crime of violence,” as that term is defined in U.S.S.G. §4B1.2,  
3 because under Washington law, it is possible to commit Third Degree Assault  
4 “through an unlawful touching that does not involve substantial physical force or  
5 seriously risk physical injury”). In Washington, there are three common law  
6 definitions of assault, one of which is intentional touching, striking, cutting, or  
7 shooting of another person, with unlawful force, that is harmful or offensive  
8 regardless of whether any physical injury is done to the person. *State v. Smith*,  
9 159 Wn.2d 778, 781, 154 P.3d 873 (2007); Washington Criminal Pattern Jury  
10 Instruction 35.50.

11 The Affidavit of Probable Cause appended hereto is referred to in the “Plea  
12 Agreement” which the Defendant signed in conjunction with his conviction under  
13 RCW 10.99.040. In the “Plea Agreement,” a box is checked next to Paragraph 2B  
14 “Sentencing Facts” which states: “Facts to be considered for imposing a standard  
15 range sentence are as set forth in the affidavit(s) of probable cause filed herein.”  
16 (Ex. B to Ct. Rec. 30 at p. 13). An “Appendix C To Plea Agreement” says the  
17 identical thing at Paragraph B which is also “checked.” (*Id.* at p. 16). A “Plea  
18 Agreement” is one of the enumerated court documents the court can rely upon to  
19 show a conviction entailed an admission to, or proof of, the necessary elements of  
20 a “crime of violence.” Here, the Affidavit of Probable Cause was incorporated by  
21 reference into the “Plea Agreement” with the consent of the Defendant who agreed  
22 that the facts contained in the affidavit could be used for the purpose of sentencing  
23 him in Snohomish County Superior Court. The Affidavit is “a record of  
24 comparable findings of fact adopted by the defendant upon entering the plea.”  
25 The Affidavit unequivocally establishes that Defendant was convicted of a “crime  
26 of violence” involving use of substantial physical force or serious risk of physical  
27 injury  
28

Accordingly, Defendant’s Base Offense Level is 20 pursuant to U.S.S.G.

1 §2K2.1(a)(4)(A), and his Total Offense Level is 17 after a three level reduction for  
2 acceptance of responsibility pursuant to U.S.S.G. §3E1.1. The resulting guideline  
3 range is 30-37 months based on a Criminal History Category of III.

4 The District Court Executive shall provide copies of this Memorandum  
5 Opinion to counsel and to the U.S. Probation Office.

6 **DATED** this 16th day of October, 2008.

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8 *s/Lonny R. Suko*

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LONNY R. SUKO  
United States District Judge